BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAN D. HITTLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 196,744
SOUTHWESTERN BELL TELEPHONE COMPANY	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appealed Administrative Law Judge John D. Clark's November 24, 1997, Award. The Appeals Board heard oral argument by telephone conference on June 3, 1998.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared for the claimant. Lawrence D. Greenbaum of Kansas City, Kansas, appeared for the respondent and its insurance carrier.

RECORD

The Appeals Board has considered the record listed in the Administrative Law Judge's Award.

STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Administrative Law Judge's Award except stipulation number 5 should be corrected to read 11.5 percent instead of 11 percent and the total amount of the settlement was $14,939.49 instead of $13,153.04.

ISSUES

This matter came before the Administrative Law Judge on claimant's Application for Review and Modification pursuant to K.S.A. 44-528. The claimant requested the Administrative Law Judge to review and modify a running award based on functional impairment entered in a March 22, 1995, Settlement Hearing held before a Special Administrative Law Judge. The respondent paid claimant 47.43 weeks of permanent partial disability compensation at the rate of $313 per week for a total of $14,939.49. All other benefits including future medical and the right to review and modify the award remained open.

The respondent discharged claimant on April 19, 1995, for reasons not associated with her injuries. Claimant contends she now is entitled to permanent partial disability benefits based upon a work disability as provided for in K.S.A. 44-510e(a). The Administrative Law Judge agreed with the claimant and awarded her permanent partial disability benefits based on a work disability of 57.5 percent.

Respondent, however, contends claimant was discharged for misconduct and therefore the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995) apply, and claimant is limited to permanent partial disability benefits based on her functional impairment which has already been paid.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the records, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Appeals Board finds the Administrative Law Judge's Award should be reversed. For reasons more fully developed below, the Appeals Board concludes claimant is not entitled to a higher work disability award, and thus her Application for Review and Modification is denied.

Claimant suffered bilateral carpal tunnel syndrome as a result of her repetitive work activities while employed by the respondent as a directory assistance operator. She was treated for the bilateral carpal tunnel syndrome condition by hand surgeon J. Mark Melhorn, M.D., of Wichita, Kansas. Dr. Melhorn first treated claimant conservatively with injections and casting. However, claimant remained at work and did not improve. The doctor then performed a left carpal tunnel release on April 18, 1994, and a right carpal tunnel release on May 16, 1994. Claimant missed little work and returned to her job as a directory assistance operator after the second surgery.

It appears claimant continued to perform her job as a directory assistance operator until respondent terminated her for the reason given by the respondent as misconduct. The respondent did not have anyone testify as to the particulars of claimant's alleged misconduct. The only testimony claimant gave in reference to her termination was to testify that the reason given by respondent for her termination was misconduct. The claimant

offered at the Motion Hearing held on October 5, 1995, a decision of the Appeals Referee concerning claimant's request for unemployment benefits. The respondent did not object, and the Administrative Law Judge admitted the decision into evidence. The Appeals Referee found claimant was discharged by the respondent but not for misconduct.

Respondent argues the principles announced in Foulk should apply to the claimant because she was discharged for cause not associated with her work-related injuries. The respondent asserts that such conduct is equivalent to the conduct of the claimant in Foulk when she refused to attempt offered employment within her restrictions.

The Appeals Board concludes, however, other factors preclude review and modification in this case. When a claimant returns to his/her previous job and is able to perform that job, the claimant cannot later modify the award to receive work disability if he/she later loses the job for reasons not related to the injury. Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

The evidence about claimant's post-injury job is unclear. Claimant testified that Dr. Ernest R. Schlachter recommended restrictions which would restrict her from doing one of two tasks in her job with respondent. These were restrictions recommended in December 1994, approximately eight months after she returned to work. She then testifies she was not able to do the restricted task. But it is not clear whether she is talking only about what Dr. Schlachter recommended or, instead, about what she in fact did or did not do in her job. Mr. Monty D. Longacre testified claimant returned to her regular job after the injury. His testimony was not, however, specific and leaves open the possibility that she returned to the same duties initially and then worked in accommodated work after Dr. Schlachter's restrictions.

The factor which tips the scales is that, given the nature of the two tasks performed, it seems unlikely that she would be allowed to perform one but not the other. Claimant worked as a directory assistance operator. The two tasks, as clarified in Mr. Jerry D. Hardin's deposition, were: (1) talking with customers on the phone; and (2) using a computer keyboard to obtain information for the customers. Dr. Schlachter testified that if the use of the keyboard involved repetitive motions this would violate his restrictions. Talking to customers on the phone did not violate his restrictions. It seems impractical and unlikely, absent some explanation that is not obvious, for her to talk to customers on the phone only to relay the customers' questions to another employee using the computer. The Board concludes that the job claimant returned to and performed for approximately one year before being terminated was an unaccommodated job.

The dissent provides a separate reason why the Watkins decision might not apply here. The dissent concludes the job claimant did, even if not an accommodated one, was not appropriate for claimant's injury. The dissent finds that the job violated the reasonable interpretation of the restrictions by both Dr. Schlachter and Dr. Melhorn. Dr. Schlachter did testify the job was not appropriate. Dr. Melhorn recommended claimant rotate her job tasks

but testified claimant would be able to do her regular job. He testified that based on his understanding of the job, it regularly allowed sufficient rest of the hands to be equivalent to rotating the tasks. The dissent apparently has interpreted the job otherwise when it states the job violated Dr. Melhorn's restrictions. It does not appear to the majority that the record reflects one way or the other. Dr. Schlachter acknowledges he does not know specifically what the tasks are and testified the one task violated his restrictions "assuming" it involves repetitive hand activity.

The Board would agree that the Watkins decision should not prevent modification to award work disability, even where a claimant returns to an unaccommodated job, if it is shown that job was inappropriate and the claimant would have eventually had to leave because of the injury. But in the Board's view, the record does not convincingly support that conclusion in this case. Claimant performed the job for approximately one year. The record contains no evidence that she considered leaving before she was terminated. The Board concludes the ruling by the Court of Appeals in the Watkins case prevents modification of the award in this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge John D. Clark's November 24, 1997, Award should be reversed and claimant's Application for Review and Modification is denied.

The remaining orders of the Administrative Law Judge in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority. I believe the facts are distinguishable from Watkins where the claimant returned to work and performed his former job duties without any accommodations until being laid off. Unlike Watkins, I find that Ms. Hittle returned to work for Southwestern Bell to a job that accommodated her medical restrictions against repetitive hand activities. Ms. Hittle's testimony, although not entirely clear, indicates that when she returned to work she performed much less data entry and typing.

If the majority is correct that Ms. Hittle returned to the job of directory assistance operator and performed that job without accommodations, Watkins still does not apply as the job was inappropriate as it violated the reasonable interpretation of both Dr. Schlachter's and Dr. Melhorn's medical restrictions.

I believe Ms. Hittle is entitled to an award of permanent partial general disability benefits based upon work disability.

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Lawrence D. Greenbaum, Kansas City, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director